No. 1040

Supreme Court of the United States

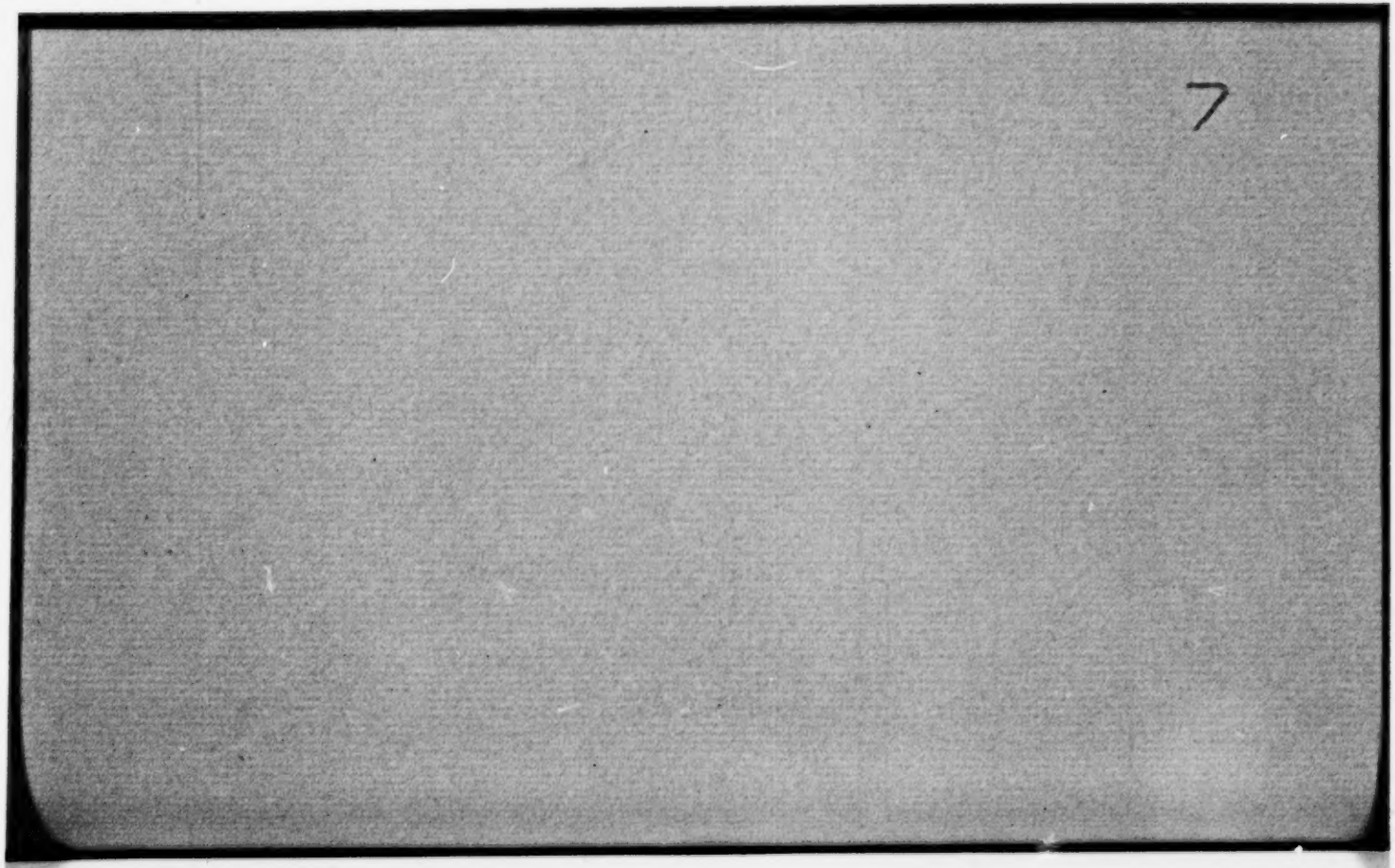
October Term, 1944

EX PARTE HAWKE

GEORGE S. HAWKE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

GEORGE S. HAWKE
Cincinnati,
Petitioner.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GEORGE S. HAWKE, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Petitioner asks for a writ to be directed to the U. S. Circuit Court of Appeals for the Sixth Circuit, to review the judgment of that Court of December 9, 1944, dismissing appeal upon motion, without hearing on the merits, under the presumed authority of Rule 75 of the Federal Rules of Civil Procedure, and the final judgment on Petition for Rehearing, which was denied December 13, 1944.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether or not, as a question of general importance in the Public Interest, uniformity of decision among Circuit Courts of Appeal, as to Section 75 of the Federal Rules of Civil Procedure (28 USCA following 723-c) should be had, looking to the simplification of procedure in appellate practice, in order to permit an appellant to SUPPLEMENT THE TRANSCRIPT OF TESTIMONY if found necessary and to permit the liberal construction of said Rule so as to promote justice and relieve against undue hardship, in order that the system of Federal Justice may be appropriately administered, SAID RULE 75 NEVER HAVING BEEN CONSTRUED IN THIS COURT.

(2) Whether or not, on the face of the record in this case and of the OPINION, the Court of Appeals erred in dismissing the appeal under said RULE 75 on motion, without any review on its merits, and in denying the Petition for Rehearing and the prayer for leave to SUPPLEMENT THE TRANSCRIPT OF "TESTIMONY".

Opinions Below

The Opinion of the District Court is shown on page 25 in the printed Transcript of Record in the Court of Appeals.

The per curiam of the Court of Appeals was rendered December 9, 1944, and is shown in the papers certified to this Court.

Rule 75 of Federal Rules of Civil Practice is Involved

We quote part of Rule 75 (c), "FORM OF TESTIMONY."

> "FORM OF TESTIMONY." *Testimony* of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the *testimony*, and any other party to the appeal, if dissatisfied with the narrative statement, may require *testimony* in question and answer form to be substituted for all or part thereof."

Definition of the Word "Testimony"

We quote the legal definitions of the word "*testimony*" in our Brief.

Summary and Short Statement of the Matter Involved

An appeal was perfected from an order of the District Court for the Southern District of Ohio, suspending for two and one-half years Mr. George S. Hawke, a lawyer duly admitted to practice in said District Court.

A Special Committee of lawyers appointed by the District Court, filed a Motion, under authority of Rule 75 (c)

in the Court of Appeals on July 5, 1944 for Substitution of "TESTIMONY" in question and answer form, for the narrative statement.

On October 17, 1944 the Court of Appeals, acting through Judges Simons, Allen and Martin, granted said motion, and also directed the filing of the exhibits to the "TESTIMONY", in the Court of Appeals, and permitted the Transcript of the Testimony to be in typewritten form, and further provided that in the event of the failure of appellant to comply with said order, the appeal would be dismissed for want of prosecution.

With full desire and every effort to comply with said order, four typewritten copies, (as provided in the Rules of said Court of Appeals) of ALL THE "TESTIMONY" were duly filed within the time by appellant.

Thereafter on November 9, 1944 the Special Committee filed a motion to dismiss the appeal for want of prosecution. IT DID NOT CLAIM IN SAID MOTION THAT APELLANT HAD NOT FILED A COMPLETE TRANSCRIPT OF THE "TESTIMONY", but represented in said Motion that he had not filed a copy of the "RECORD", and that he had omitted "professional statements" of himself and of the prosecuting Committee, and that the transcript filed showed only a small portion of the occurrences at the trial.

On December 9, 1944 the Court of Appeals, acting this time through Judges Hicks, Simons and Martin, entered an Order sustaining said Motion for want of prosecution, for the reasons stated per curiam.

Appellant on December 11, 1944 filed his Petition for Rehearing, and to set aside said order dismissing appeal, AND FURTHER PRAYED FOR LEAVE TO SUPPLEMENT THE TRANSCRIPT OF TESTIMONY to include the additional matters indicated by the Court to be necessary. On December 13, 1944 the Court of Appeals entered an order as follows: "The petition for rehearing and to set aside order dismissing appeal is hereby denied," but made no reference to the prayer for leave to SUPPLEMENT THE TRANSCRIPT OF THE TESTIMONY, although the matter was subsequently called to its attention, when on December 21, 1944 appellant filed a motion to set

aside or modify the orders of December 13th and December 9th. On Jan. 15, 1945 the Court overruled said motion.

RULE 10, PAR. 1, SIXTH CIRCUIT COURT OF APPEALS. APPEALS IN CIVIL ACTIONS.

1. "Federal Rules of Civil Procedure, adopted by the Supreme Court pursuant to Act of June 19, 1934, Nos. 73, 74, 75 and 76, are adopted as rules of this court in cases to which they may apply."

Specification of Errors to be Urged

The Court of Appeals prejudicially erred in:

(1) That the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter of general importance in the public interest, namely a construction of Rule 75 of the Federal Rules of Civil Procedure.

(2) That it has decided an important question of Federal law, which has not been, but should be, settled by this Court, to-wit, said Rule 75.

(3) That said Court has so far departef from the accepted and usual course of judicial proceedings, that it has denied Petitioner leave under said Rule 75 to correct his Transcript of Testimony, by filing a Supplemental Transcript embodying the matters indicated by the Court to be further necessary.

(4) That it has, in violation of said Rule 75, dismissed the Appeal herein without any review on its merits, thereby causing a miscarriage of justice.

WHEREFORE, it is respectfully submitted that this Petition should be granted.

George S. Hawke

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT

The only OPINION OF THE COURT OF APPEALS is the Per Curiam filed December 9, 1944 (R.) and it sets forth the reasons given by the Court for dismissing the appeal for want of prosecution. This Per Curiam Opinion has no bearing upon the opinion of the District Court on the merits. (R. 25 Ct. of Ap.)

JURISDICTION. It is claimed that this Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

This case involves questions of substance relating to the application of the Federal Rules of Civil Procedure, especially Rule 75, which does not appear to have ever been construed by this Court. The erroneous application of some features of said Rule 75, has unlawfully deprived Petitioner of his right to maintain his appeal, and his right to have a review of his appeal on its merits.

This case involves the due, orderly and decorous administration of justice, as involved in the Appellate practice under said Rule 75 and seeks to obtain from this Court a construction of said Rule as a question of general importance in the public interest, in order to bring about uniformity of decision among Circuit Courts of Appeal regarding said Rule.

The Petition for Rehearing was denied on December 13, 1944, from which last order this appeal for a Writ of Certiorari is taken.

STATEMENT OF THE CASE. The general nature of the case has been stated in the Petition for Writ, which is hereby adopted and made a part of this brief.

ARGUMENT

Assignment of Error No. One

The Court of Appeals prejudicially erred in that said Court has rendered a decision in conflict with the decision of another Court of Appeals on the same matter of general importance in the public interest, namely the construction of Rule 75 of the Federal Rules of Civil Procedure.

Under favor of Rule 75 (c) the Special Committee appointed by the District Court moved the Court of Appeals for an order to SUBSTITUTE THE "TESTIMONY" in question and answer form for the narrative form originally filed by the Appellant. (R.)

Said motion was sustained, and a typewritten Transcript of all the "Testimony" in question and answer form was duly filed by the Appellant.

NO CLAIM WAS MADE in the subsequently filed MOTION OF THE SPECIAL COMMITTEE, that Appellant had not filed a transcript of ALL THE TESTIMONY. The claim was made, that Appellant had filed only a portion of the "RECORD".

By use of the word "RECORD", we claim the following was meant:

MIDDLETON VS. HARTFORD ACCIDENT, 119 Fed. (2) 721 (C. C. of Ap. 5th Circ. May 16, 1941)

> Head note 1. "Record, within federal rule referring to designation of portions of "record", proceedings and evidence to be contained in record on appeal, means writings filed with clerk as pleadings, process, formal orders of judge, and such other writings as have always been considered parts of record in law or equity case in district court. Fed. Rules of Civil Pro. Rule 75 (a)."

The said Motion also claimed that the Transcript of the Testimony filed by Appellant did not include the examination of the Special Committee and of the Appellant "UPON PROFESSIONAL STATEMENTS".

WE ASK THIS COURT TO CONSIDER WHETHER OR NOT "PROFESSIONAL STATEMENTS" ARE MEANT TO BE INCLUDED IN THE LANGUAGE OF RULE 75 (c) "TESTIMONY" OF WITNESSES.

We have quoted the language of Rule 75 (c) in our Petition for Writ, which is hereby adopted and made a part of this Brief.

We called the attention of the Court of Appeals in our Petition for Rehearing in which we prayed for Leave to

File a Supplemental Transcript, to the LEGAL DEFINITION OF THE WORD "TESTIMONY".

EDELSTEIN VS. U. S., 149 Fed. 636, 640.

> "The word 'testimony' or to 'testify' implies the usual preliminary qualifications of taking an oath to speak the truth. Such an implication is so reasonable and well understood among lawyers and legislators that we would do violence to common intelligence to impute to Congress any other intention in the legislation in question."

PATTERSON VS. STATE OF OHIO, 122 Ohio State 96, 98.

> "Testimony is a statement under oath in a legal proceeding; the evidence of a witness under oath or affirmation."

As to "professional statements," we call attention to a decision involving Federal Rule 75 (e) dated April 30, 1942.

ROYAL PETROLEUM CORP. VS. SMITH, 127 Fed. (2) 841. C. C. of Ap. Second Circuit.

> Head note #4. "Under procedural rule forbidding inclusion in record of matter not essential to decision of questions presented by appeal, colloquy of court and counsel was improperly included in record. (Fed. Rules 75 (e))

GENERAL AMERICAN TANK VS. GOEBEL, 80 Fed. (2) 849.

> Head note #7. "Stenographic reproduction of all argument in court would not be regarded as constituting any part of record on appeal which reviewing court must consider."

Conflict of Instant Case with Decisions of Other Courts of Appeal

HALL VS. GORDON et al., 119 Fed. (2) 463 U. S. Court of Appeals for Dist. of Col. May 1, 1941.

> p. 464 (1, 2) "In our view the Federal Rules of Civil Procedure governing the preparation of the record on appeal should be liberally construed so as to promote justice and relieve against undue hardship. The letter of the rule should be followed, except where undue hardship would result. In such cases the rules should be flexible rather than rigid. To apply the letter of Rule 75 (c) in this case would of course defeat the appeal, and in our view this should not be permitted to happen if, without undue hardship to either party, it can be avoided."

DEMPSEY VS. GUARANTY TRUST CO., 131 Fed. (2) 103, Cir. Court of Ap. Seventh Circ., Oct. 28, 1942.

> Head note #3. "The purpose of federal rule relating to supplementing of record on appeal was to provide a simple method of adding to record on appeal any matter properly a part thereof which had been omitted therefrom by error or accident and to permit such additions even after the record had been transmitted to the appellate court." "Federal Rules of Civil Procedure, Rule 75, 28 U.S.C.A. following 723c."

UNITED STATES EX REL REMPAS VS. SCHLOTFELDT, 123 Fed. (2) 109, C. C. of Ap. 7th Circ., Oct. 11, 1941.

> Head note #3. "The Federal Rules of Civil Procedure and the Rule of the Circuit Court of Appeals for the Seventh Circuit, were intended to expedite and simplify practice and procedure, and ample provision is made to relieve against hardship and excusable neglect." Fed. Rules of Civil Pro. Rules 73 (a,g), 75 (j).

PENCE VS. UNITED STATES, 121 Fed (2) 804. C. C. of Ap. 7th Cir., July 2, 1941.

Head note #1. "The failure of an appellant to comply with court rule pertaining to the inclusion of a statement of points in record is not 'jurisdictional' and does not neccessitate dismissal of appeal." Fed. Rules of Civ. Pro., Rule 75 (d).

Opinion of a District Judge

We note in Sonken vs. Atchison, 36 Fed. Sup. 909, District Court, W. D. Missouri, W. D., February 13, 1941, the following:

Head note #1. "Where appellant, who appeals from judgment of District Court, omits part of the evidence in designation of evidence for inclusion in record on appeal, the APPELLEE HAS DUTY to prepare and file such omitted parts, which may be filed in narrative form." Fed. Rules of Civil Pro., Rule 75.

IN RE HENDY, 2 Fed. Rules Decisions, p. 244, Dist. Court N. D. Calif., Jan. 20, 1942.

Head note #2. "Where appellee's request that appellant furnish a more complete record is unreasonable, appellate court, to protect appellants, may withhold or impose costs as circumstances of case may require." Fed. Rule 75 (e).

Assignment of Error No. Two

That the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit, the intent and scope of Rule 75 of the Federal Rules of Civil Procedure.

With all possible diligence at our command we have been unable to find any decision of this Court interpreting or applying Rule 75 of the Civil Rules. We therefore assert that this Court has never construed said Rule, and that the question is new, and that it is a matter of general importance in the public interest.

Assignment of Error No. Three

That the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, that it has denied Petitioner leave under Rule 75 to correct his Transcript of Testimony by filing a Supplemental Transcript, embodying the matters indicated by the Court of Appeals to be necessary.

As to the Per Curiam of December 9th, 1944

The only information which the Court of Appeals had before it when it wrote its per curiam and dismissed the appeal for want of prosecution, were the various motions and briefs in the Court of Appeals and the record from the District Court, and its order of October 17, 1944 granting the motion of the Special Committee for the Substitution of "TESTIMONY" in question and answer form, and providing that the appeal would be dismissed in case of default.

We refer to the court's errors in the order in which they appear in the per curiam, and the Court used the following language:

> No. 1. * * * it became necessary, on motion of the relator BAR ASSOCIATION COMMITTEE."

The Court should have observed from the printed record, briefs and motions in the Court of Appeals that no BAR ASSOCIATION committee was involved, but merely a Special Committee appointed by the District Judge.

> No. 2. "Appellant has failed to comply with the order."

The fact that the Special Committee stated in its Motion that appellant had failed to comply did not prove such assertion.

Appellant has filed a transcript of ALL THE "TESTIMONY" as he understood the order, and as he understood the meaning of the word "testimony". The second motion of the Committee was filed in the hope of getting rid of an appeal which was as unpopular to the Committee as it was

to this Petitioner. Appellant had filed as ordered, all of the original exhibits to the "Testimony".

If the Court, in consideration of the Special Committee's motion, had discovered that the word "Testimony" did not include "Professional Statements", the matter would easily have been remedied by an order to Supplement the Transcript of Testimony by including everything the Court desired, and of course such order would have been obeyed to the letter, for the matter is of the utmost importance to the Petitioner. An order dismissing the appeal for want of prosecution was out of all reason, and constituted the greatest injustice which the court could inflict on Petitioner.

> No. 3. "It should be commented, moreover, that the typewritten transcript filed by appellant bears no official certification or verification."

No claim was made by the Special Committee in any of its several motions and briefs in the Court of Appeals, that any official certification or verification was required by any statute or Rule. From the information conveyed in the several motions and briefs on file in the Court of Appeals, it must have learned that there had been no official stenographer appointed by the District Court under Rule 80.

Such a finding of the Court conflicts with the following decision of another Court of Appeals.

MIDDLETON VS. HARTFORD ACCIDENT, 119 Fed. (2) 721. Cir. Ct. of Ap., Fifth Cir., May 16, 1941.

> Head note #6. "A trial was not "stenographically reported" within federal rule governing record on appeal, and stenographer's certificate as to correctness of transcript would not authenticate it, unless he was appointed under the rule governing appointment of stenographers, or unless he was agreed on by the parties." Fed. Rules of Civ. Pro., Rules 75, 80 (a,b).

> No. 4. "This court has become convinced from the procedure of the appellant on this appeal, that he is not prosecuting his appeal in good faith upon a true and complete record of the proceedings below."

Nothing that could have been said was further from the truth than such finding. Even the Special Committee in its Motions and Briefs never even whispered such a thing, for it does violence to common sense, which is the basis of all law.

Would any lawyer who had practiced for forty years attempt to act in bad faith in a matter of such grave importance, if he was sane?

There was nothing before the Court which could justify such a finding, and the dismissal of the appeal was as erroneous as the findings which led up to it.

Assignment of Error No. Four

That the Court of Appeals has, in violation of Rule 75, dismissed the Appeal herein without any review on its merits, thereby causing a miscarriage of justice.

The Special Committee filed no Brief in Answer to the brief of appellant on the merits.

THE PALPABLE WRONGS AND THE ERRORS OF THE COURT APPEAR UPON THE FACE OF THE PER CURIAM AND THE JUDGMENT ORDER.

There was no failure on Petitioner's part to take every legal step to secure the review of the judgment which affected the validity of the appeal or which could justify the dismissal of the appeal.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Court of Appeals of the Sixth Circuit, and setting aside the order dismissing this Petitioner's appeal, under findings this Court may make regarding same, and allowing said Court of Appeals to proceed with this appeal under the jurisdiction it first acquired thereof, in accordance with law.

Respectfully submitted,

GEORGE S. HAWKE,

Petitioner.

No. 1040

FILED
MAY 16 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1944

EX PARTE HAWKE

GEORGE S. HAWKE,
Petitioner.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

GEORGE S. HAWKE
407 First Nat. Bldg., Cincinnati,
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Supreme Court of the United States

October Term, 1944

EX PARTE HAWKE

GEORGE S. HAWKE, *Petitioner.*

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Comes now George S. Hawke, petitioner in the above entitled cause, in which this Court denied his Petition for Writ of Certiorari on April 23, 1945, and within twenty-five days therefrom and at the same term of court, files this his Petition for Rehearing of Order Denying Certiorari, under Rule 33.

The purpose of this Petition is to call attention to material matters of law, which we fear have been inadvertently overlooked by the Court. The decision of this Court denying certiorari may have been caused by the fact, that while petitioner thought he had clearly stated that the precise question was one of first impression, and suggested its novelty and importance, and urged the error of the court below in failing to apply the doctrine of strict construction, petitioner now thinks that the attention of this Court was not properly drawn of this question through his own inadvertence.

In a disbarment proceeding in the District Court against Petitioner (R. 4,5) to strike his name from the roll, a judgment of temporary suspension (R. 36) was appealed to the Sixth Circuit Court of Appeals, which dismissed the appeal without any hearing on its merits, (R. 55) on a Motion of a special committee to Dismiss for Want of Prosecution, (R. 53) which motion claimed that petitioner had not filed a complete Transcript of Testimony, in question and answer form (R. 51,53) while he contends he had complied with the Court's order. (R. 52) For the reason that he could not know from the Order that same was required, he had not filed a transcript including the examination by the Court of both the relator committee and of appellant as upon the professional statements requested in the Motion to Dismiss. (R. 53,54) The Court granted said Motion to Dismiss Appeal for Want of Prosecution, (R. 54) in accordance with its Per Curiam. (R. 55) The same found that

appellant had failed to comply with the Order (R 52) to substitute the "TESTIMONY" in typewritten form for the testimony in narrative form; and that the typewritten transcript filed by appellant bore no official certification or verification; and that appellant was not prosecuting his appeal in good faith upon a true and complete record of the proceedings in the District Court. (R. 55,56)

The Court denied the Petition for Rehearing and denied leave to file a Supplemental Transcript to comply with the Court's requirements expressed in its per curiam, (R.55) whereupon, within time, petitioner brings this Petition for Certiorari.

FOR GROUNDS OF REHEARING PETITIONER RESPECTFULLY REPRESENTS:

I

That while this Court has construed many of the new Federal Rules of Civil Procedure, it has never construed Rule 75 which applies to appellate procedure.

This case involves a question as to the meaning and intent of Rule 75, which petitioner contends has been misconstrued and misapplied by the lower court, so that his appeal was dismissed without any review on its merits. That such judgment of dismissal was legally unwarranted, thereby causing such a miscarriage of justice as to warrant petitioner's efforts to secure this Court's construction of Rule 75 by means of Certiorari.

We submit that the question here presented is new, and that the same is important, and that it should be decided in order to secure uniformity of decision in the lower courts. In our Petition for Certiorari and Brief we endeavored to call attention to the fact that there is a conflict in the instant case with the judgment of another Court of Appeals.

ROBERTSON & KIRKHAM, JURISDICTION Of The SUPREME COURT OF THE UNITED STATES.

> Sec. 292. "Where the decision of the Circuit Court of Appeals sought to be reviewed by certiorari, directly conflicts upon a question of Federal Law, with the decision of another Circuit Court of Appeals upon the same question, the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved." Rule 38, par. 5(b).

ON CERTIORARI, THIS SUPREME COURT HAS CONSTRUED MANY OF THE FEDERAL RULES OF CIVIL PROCEDURE, BUT IT HAS NEVER CONSTRUED RULE 75 INVOLVED HERE, AS WILL APPEAR FROM THE FOLLOWING:

LIST OF DECISIONS OF SUPREME COURT INVOLVING THE CONSTRUCTION OF MANY OF THE RULES OF CIVIL PROCEDURE

Civil Rule No.	Reported in:	Style of Case	Decided
5	64 Sup. Ct. 334	Hall vs. Dawes	Jan. 3, 1944
6 (b)	63 Sup. Ct. 543	Leishman vs. Associated	Feb. 15, 1943
8 (c)	63 Sup. Ct. 477	Palmer vs. Hoffman	Feb. 1, 1943
8 (e)	62 Sup. Ct. 214	U. S. vs. Kales	Dec. 8, 1941
12 (h)	64 Sup. Ct. 268	Mercoid Corp. vs. Mid-Continent	Jan. 3, 1944
13	"	"	"
13	62 Sup. Ct. 1085	Reeves vs. Beardall	May 11, 1942
14	"	"	"
18	"	"	"
20	"	"	"
24	64 Sup. Ct. 905	Allen vs. Nat. Cash	May 1, 1944
26 (b)	63 Sup. Ct. 477	Palmer vs. Hoffman	Feb. 1, 1943
34	"	"	"
38	64 Sup. Ct. 268	Mercoid Corp. vs. Mid-Continent	Jan. 3, 1944
42	62 Sup. Ct. 1085	Reeves vs. Beardall	May 11, 1942
42 (b)	64 Sup. Ct. 268	Mercoid Corp. vs. Mid-Continent	Jan. 3, 1944
50	63 Sup. Ct. 1077	Galloway vs. U. S.	May 24, 1943
52	64 Sup. Ct. 406	Dist. of Columbia vs. Pace	Jan. 10, 1944
52 (a)	63 Sup. Ct. 1141	Kelley vs. Everglades	June 1, 1943
52 (a)	63 Sup. Ct. 1333	Schneiderman vs. U. S.	June 21, 1943
53	61 Sup. Ct. 1015	Holiday vs. Johnston	May 26, 1941
54 (b)	62 Sup. Ct. 1085	Reeves vs. Beardall	May 11, 1942
56	62 Sup. Ct. 402	Morton Salt vs. Suppiger	Jan 5, 1942
56	64 Sup. Ct. 724	Sartor vs. Ark. Gas	Mch. 27, 1944
58	64 Sup. Ct. 334	Hill vs. Dawes	Jan. 3, 1944
59	63 Sup. Ct. 543	Leishman vs. Associated	Feb. 15, 1943
69 (a)	64 Sup. Ct. 1015	Huddleston vs. Dwyer	May 15, 1944
73 (a)	63 Sup. Ct. 543	Leishman vs. Associated	Feb. 15, 1943
76	61 Sup. Ct. 1023	Griffin vs. McCoach	June 2, 1941
77 (d)	64 Sup. Ct. 334	Hill vs. Hawes	Jan. 3, 1944
79 (a)	64 Sup. Ct. 334	"	"
81 (b)	64 Sup. Ct. 1015	Huddleston vs. Dwyer	May 15, 1944

From the foregoing complete list, it should be apparent that Rule 75 has never been construed by this Court.

The Rule of the Sixth Circuit Court of Appeals adopting Rule 75 is shown at top of page 4 of the Petition for Writ in this case.

ROBERTSON & KIRKHAM, "JURISdiction ~~PRUDENCE~~ OF SUPREME COURT OF U. S."

> Page 651. "It is obviously important that the Supreme Court keep the lower federal courts informed and in line on the proper solution of the never ending series of problems constantly arising in the fields of federal court jurisdiction and procedure."
>
> Page 652. "Questions of nicety or novelty are constantly presented, not only in respect of jurisdiction but also upon important problems of procedure, and the use of certiorari to settle them is often required although no conflict of decisions exists."

In the Petition for Certiorari, Petitioner used the following language at bottom of page 9, and erroneously thought that said language was sufficient to state that the case was one of first impression:

> "Assignment of Error No. Two. That the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit, the intent and scope of Rule 75 of the Federal Rules of Civil Procedure."
>
> "With all possible diligence at our command, we have been unable to find any decision of this Court interpreting or applying Rule 75 of the Civil Rules. WE THEREFORE ASSERT THAT THIS COURT HAS NEVER CONSTRUED SAID RULE AND THAT THE QUESTION IS NEW, AND THAT IT IS A MATTER OF GENERAL IMPORTANCE IN THE PUBLIC INTEREST." (Caps here are used for first time)

For the foregoing reason we submit that the attention of this Court has not been properly drawn to the question, through the language used by the petitioner, and that he did not make it clear that the question was one of first impression and that it was novel and important, and that it had never been decided by this Court.

II

CONFLICTING DECISION WITHIN THE SAME CIRCUIT

In support of Petitioner's contention that Rule 75 should

be construed now by this Court in this action, we call attention to the fact that the Sixth Circuit rendered a prior decision which conflicts with its own decision in the instant case. This fact might indicate that a decision on this question in the Sixth Circuit depends upon what particular combination of Circuit Judges should happen to be sitting upon the bench.

Said former decision of the Sixth Circuit construing Rule 75 was made on May 8, 1940 in

DRYBROUGH vs. WARE, 111 Fed. REP. (2) 548

(Judges Simons, Hamilton and Arant)

Head Note 7. "The appellate court's power to dismiss appeal for insufficiency of the record should not be exercised generally unless omission arose from negligence or indifference of appellant and, where good faith is shown, appellee will be directed to designate such additional papers, used below as he deems necessary, or the court, to avoid injustice, may on proper suggestion, or on its own motion, direct that the omission be corrected by supplemental transcript or remand of cause for finding on controverted fact questions.

Page 57 of the Record herein shows that in Petitioner's Petition for Rehearing in the Court of Appeals, he expressly asked leave to file a Supplemental Transcript of the Testimony in the following language;

"That this court has ample power to permit a correction of the record and to supplement the record by reason of such errors under Rule 75 (h) of the Rules of Civil Procedure, and that the failure of appellant to understand the full import of this Court's Order is not jurisdictional under Rule 75 (d)."

Petitioner prayed in said Petition for Rehearing, that he be granted leave to Supplement the "Transcript of Testimony," which leave was denied by the court's order denying the Petition for Rehearing, (R. 57) from which last order this Petition for Certiorari is predicated.

For the foregoing reasons, Petitioner respectfully urges that a rehearing be granted, and that upon further consideration, the order of April 23, 1945 denying the Petition for Certiorari, be revoked, and that the Writ of Certiorari issue.

GEORGE S. HAWKE, *Petitioner.*

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is, in my opinion, well founded, and that it is presented in good faith, and not for purposes of delay.

GEORGE S. HAWKE, *Petitioner.*